BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF HAWAII

---- In the Matter of ---- PUBLIC UTILITIES COMMISSION Instituting a Proceeding to Investigate the Implementation of Feed-In Tariffs.	)	DOCKET NO. 2008-0273

HAWAII BIOENERGY, LLC'S RESPONSES TO THE NATIONAL REGULATORY RESEARCH INSTITUTE'S THRESHOLD LEGAL ISSUES OR QUESTIONS

and

CERTIFICATE OF SERVICE

MORIHARA LAU & FONG LLP

KENT D. MORIHARA, ESQ.
KRIS N. NAKAGAWA, ESQ.
SANDRA L. WILHIDE, ESQ.
Suite 400
Davies Pacific Center
841 Bishop Street
Honolulu, Hawai'i 96813
(808) 526-2888

Attorneys for HAWAII BIOENERGY, LLC

BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF HAWAII

----- In the Matter of -----	
PUBLIC UTILITIES COMMISSION	DOCKET NO. 2008-0273
Instituting a Proceeding to Investigate the Implementation of Feed-In Tariffs.	

HAWAII BIOENERGY, LLC'S RESPONSES TO THE NATIONAL REGULATORY RESEARCH INSTITUTE'S THRESHOLD LEGAL ISSUES OR QUESTIONS

COMES NOW Hawaii BioEnergy, LLC ("HBE"), by and through its attorneys, Morihara Lau & Fong LLP, and hereby respectfully submits its responses to the threshold legal questions in Appendix C of the National Regulatory Research Institute's Scoping Paper titled "Feed-in Tariff's: Best Design Focusing Hawaii's Investigation," dated December 2008. HBE's responses are filed pursuant to and in accordance with the Hawaii Public Utilities Commission's directive, dated December 11, 2008.

DATED: Honolulu, Hawaii, January 12, 2009.

KENT D. MORIHARA
KRIS N. NAKAGAWA
SANDRA L. WILHIDE

Morihara Lau & Fong LLP
Attorneys for Hawaii BioEnergy, LLC

HAWAII BIOENERGY, LLC'S RESPONSES TO THE NATIONAL REGULATORY RESEARCH INSTITUTE'S THRESHOLD LEGAL ISSUES OR QUESTIONS

DOCKET NO. 2008-0273

Threshold Issues (Legal)

1. If the price associated with a feed-in tariff exceeds the utility's avoided cost, then by definition the utility's customers will incur higher costs than they would in the absence of the feed-in tariff. Please comment on the legal implications of this result. For example:

   a) Is this result permissible under current Hawaii statutes?

RESPONSE: **Under the current language of Hawaii Revised Statutes ("HRS") § 269-27.2, this result does not appear permissible. HRS § 269-27.2(c) states, in relevant part, that "[i]n the exercise of its authority to determine the just and reasonable rate for the nonfossil fuel generated electricity supplied to the public utility by the producer, the [C]ommission shall establish that the rate for purchase of electricity by a public utility shall not be more than one hundred per cent of the cost avoided by the utility when the utility purchases the electrical energy rather than producing the electrical energy." (Emphasis added). Because we understand that the proposed feed-in tariff to be considered by the Commission in this proceeding would be solely applicable to "nonfossil fuel generated electricity" supplied to the HECO Companies, we believe that the specific language of HRS § 269-27.2(c) appears to restrict the Commission from approving and adopting a feed-in tariff that exceeds the utility's avoided cost.**

   b) Does HRS § 269-27.2 create a ceiling on the feed-in tariff price?

RESPONSE: **Yes. The language of HRS § 269-27.2 does appear to create a ceiling on the feed-in tariff price. See the response to part a above. At this time, we are not aware of any Hawaii statutory provision that would specifically authorize the Commission to waive or**

otherwise modify this ceiling. As such, in order for the feed-in tariff price to be greater than the utility's avoided cost, we believe that legislative amendments may be necessary to either revise the language in HRS § 269-27.2 or to establish new statutory provision(s) or language that will provide the Commission with the authority and flexibility to allow or approve a feed-in tariff price that exceeds the utility's avoided cost. We believe this position is consistent with the "HECO Feed-In Tariff Program Plan" (page 23) submitted by the HECO Companies and the Consumer Advocate on December 23, 2008 as part of their Joint Proposal on Feed-in Tariffs.

c) If so, how do the signatories to the Energy Agreement (or other parties to this proceeding) propose to demonstrate that each feed-in tariff price does not violate the statute?

RESPONSE: **While we do not yet have a firm position on this, as a preliminary matter, we believe that, under the current statutory language, a feed-in tariff price should be found to be in compliance with (i.e., not in violation of) the above statutory requirement if it can be demonstrated that the payments to be made by the utility at the proposed feed-in tariff price over a period in question will not exceed the utility's estimates of what its avoided costs will be over that period in question.**

2. As with any administrative agency decision, a Commission decision approving a feed-in tariff must be supported with substantial evidence.

a) Focusing on the price term, what evidence is legally necessary? Consider these options, among others:

i) evidence of actual costs to develop similar projects in Hawaii

ii) generic (i.e., non-Hawaii) evidence of costs associated with each particular technology

iii) evidence that the tariff price results in costs equal to or below the utility's avoided cost

RESPONSE: **We believe that the Commission should be able to weigh and consider any and all different types of evidence that it deems to be relevant and/or material in addressing the feed-in tariff pricing scheme being proposed or that should otherwise be established. Given the current ceiling that appears to be imposed by HRS § 269-27.2, sufficient evidence is needed to accurately determine, establish or project the utility's avoided costs (i.e., costs avoided by the utility in not having to produce the electricity itself) to ensure that this ceiling is not arbitrarily established. In doing so, HRS § 269-6(b), as amended during the 2007 legislative session, specifically allows the Commission to "consider the need for increased renewable energy use in exercising its authority and duties" under HRS Chapter 269. Given this, evidence should also be provided demonstrating that the feed-in tariff pricing scheme ultimately established sufficiently promotes, and does not unduly detriment, the facilitation of renewables in the State of Hawaii.**

b) By what process do the signatories (and other parties to this proceeding) propose to gather this evidence and present it the Commission, under the procedural schedule proposed by the signatories?

RESPONSE: **We believe the procedural steps and timing proposed by both Hawaii BioEnergy, LLC and Maui Land and Pineapple Company, Inc. in their proposed Stipulated Regulatory Schedule (Exhibit A) submitted to the Commission on December 22, 2008 is the best approach or process to attempt to ensure that evidence**

provided during this proceeding can be thoroughly developed and subsequently reviewed and analyzed to assist the Commission in addressing the issues and developing a sound record. Unlike other schedules proposed by other parties, it was our intent to propose a less compressed schedule to hopefully allow for development of a complete and sound record to not only establish an appropriate feed-in tariff pricing scheme that complies with any statutory requirements that are in place at that time, but to also address all of the other complex and policy-setting issues to be addressed in this proceeding and that are necessary to hopefully develop a feed-in tariff scheme that will sufficiently accelerate and facilitate the addition *of renewable energy from new sources and to* encourage increased development of alternative energy projects in the State.

3. Assume the Commission does create feed-in tariffs, which entitle the seller to sell to the utility at the tariff price.

   a) If the tariff price exceeds the utility's avoided cost, is there a violation of PURPA, provided the seller is relying on a state law right to sell rather than a PURPA right to sell?

RESPONSE: **It is our understanding that the avoided cost ceiling imposed by PURPA only applies for "qualified facilities", or QFs. Given this, we do not believe that that there would be a violation of PURPA in the above-referenced case unless the seller has qualified itself with FERC as a "qualified facility", or QF, under PURPA, and, in that connection, is asserting its right to sell under PURPA. Therefore, as long as the seller has not been qualified as a QF and is not relying on a PURPA right to sell as a QF, we believe that PURPA does not apply and the establishment of a tariff price in excess of the**

utility's avoided cost would thus not violate PURPA.

It is also our understanding that other states have allowed or authorized utility purchase programs for renewables that have provided tariff incentives resulting in payments above avoided costs. For example, in 2005, we understand that Washington State passed a statewide policy, called a performance-based incentive, that offered payments of 15 cents per kilowatt-hour (kWh) of solar generation, increasing to as much as 54 cents per kWh if system components were manufactured in the state. It is our understanding that this pricing scheme significantly exceeds the utilities' avoided costs (e.g., the state's largest utility, Puget Sound Energy, currently has an avoided cost schedule ranging from 8 cents/kWh in 2009 to 12 cents/kWh in 2019). The program was structured so that utilities were not required to participate in the program, but would be fully compensated for these payments through state tax credits if they did participate. Beginning in 2006, we also understand that New Mexico's largest utility, PNM, has offered a 13 cents/kWh bonus payment to solar generators in addition to receiving credits under its net metering program, compared to avoided cost schedules ranging from 7 to 11 cents/kWh. We also understand that Gainesville Regional Utilities, a municipal utility in Florida, recently passed a solar feed-in tariff that will pay 32 cents per kilowatt-hour, significantly above avoided costs.

b) If the tariff price exceeds the utility's avoided cost (as calculated prior to the existence of the tariff), could a seller assert a PURPA right to a sale at the tariff price, on the grounds that the utility now has a new "avoided cost" equal to cost it would have incurred under the state-mandated feed-in tariff?

RESPONSE: **We are not certain as to what the question is specifically requesting. Given that, we have limited our response to only the specific portion of the question asking, "could a seller assert a PURPA right to a sale at the tariff price . . .?" With respect to this, our response is that, if the Commission established a tariff price that would apply to the seller, that tariff price would control until modified by future Commission order. As stated in our response to Item 1(c) above, we believe that, under the current statutory language, a feed-in tariff price should be found to be in compliance with (i.e., not in violation of) the avoided cost ceiling under HRS § 269-27.2 if it can be demonstrated that the payments to be made by the utility at the proposed feed-in tariff price over a period in question will not exceed the utility's estimates of what its avoided costs will be over that period in question. Once so established, it should not matter if the tariff price subsequently exceeds the utility's avoided cost for any subsequent period in question, and the tariff price would continue until such time as either the utility or the Commission elected to seek and/or establish a new tariff price (at which time a new period in question could be utilized). Given this, a seller's ability to assert a right to sell at the tariff price would result by Commission order and not from any PURPA right.**

c) If the price associated with a feed-in tariff is less than the utility's avoided cost, what benefit does the tariff offer the developer that is not already available under PURPA?

RESPONSE: **A feed-in tariff is beneficial if it establishes terms, rates and conditions that allow developers to be fairly compensated for the costs and risks that they incur in providing renewable energy projects in Hawaii. In the specific case where the feed-in tariff rate may**

be less than a utility's avoided costs, the tariff would offer a developer transparency and certainty as to the revenues it will receive during any given period of time (i.e., until said tariff is modified by Commission order). This is beneficial not only for the developer's financial projections but also in obtaining and securing financing for its project. In addition, because rates/charges are often one of the more contested and time consuming items to negotiate in any agreement, the establishment of a tariff schedule may materially reduce the amount of time and costs incurred to negotiate and enter into a power purchase arrangement. However, the benefit from the transparency and certainty of the tariff would be just one factor among many in determining whether overall, the feed-in tariff is beneficial to developers.

d) Please offer any other comments concerning the legal and practical relationship between the feed-in tariff and existing PURPA rights and obligations.

RESPONSE: **We do not have any additional comments at this time.**

CERTIFICATE OF SERVICE

I hereby certify that on this date I served copies of the foregoing document on the following parties, by causing copies hereof to be mailed, postage prepaid, properly addressed or hand delivered to the following:

CATHERINE P. AWAKUNI EXECUTIVE DIRECTOR DEPARTMENT OF COMMERCE & CONSUMER AFFAIRS DIVISION OF CONSUMER ADVOCACY P.O. Box 541 Honolulu, Hawaii 96809	2 Copies Hand Deliver
DEAN MATSUURA MANAGER REGULATORY AFFAIRS HAWAIIAN ELECTRIC COMPANY, INC. P.O. Box 2750 Honolulu, Hawaii 96840-0001	1 Copy U.S. Mail
JAY IGNACIO PRESIDENT HAWAII ELECTRIC LIGHT COMPANY, INC. P. O. Box 1027 Hilo, Hawaii 96721-1027	1 Copy U.S. Mail
EDWARD L. REINHARDT PRESIDENT MAUI ELECTRIC COMPANY, LTD. P. O. Box 398 Kahului, Hawaii 96732	1 Copy U.S. Mail
THOMAS W. WILLIAMS, JR., ESQ. PETER Y. KIKUTA, ESQ. DAMON L. SCHMIDT, ESQ. GOODSILL, ANDERSON QUINN & STIFEL Alii Place, Suite 1800 1099 Alakea Street Honolulu, Hawaii 96813	1 Copy U.S. Mail

ROD S. AOKI, ESQ.
ALCANTAR & KAHL LLP
120 Montgomery Street
Suite 2200
San Francisco, California 94104

1 Copy
U.S. Mail

MARK J. BENNETT, ESQ.
DEBORAH DAY EMERSON, ESQ.
GREGG J. KINKLEY, ESQ.
DEPARTMENT OF THE ATTORNEY GENERAL
425 Queen Street
Honolulu, Hawaii 96813
Counsel for DBEDT

1 Copy
U.S. Mail

CARRIE K.S. OKINAGA, ESQ.
GORDON D. NELSON, ESQ.
DEPARTMENT OF THE CORPORATION COUNSEL
CITY AND COUNTY OF HONOLULU
530 South King Street, Room 110
Honolulu, Hawaii 96813

1 Copy
U.S. Mail

LINCOLN S.T. ASHIDA, ESQ.
WILLIAM V. BRILHANTE JR., ESQ.
MICHAEL J. UDOVIC, ESQ.
DEPARTMENT OF THE CORPORATION COUNSEL
COUNTY OF HAWAII
101 Aupuni Street, Suite 325
Hilo, Hawaii 96720

1 Copy
U.S. Mail

MR. HENRY Q CURTIS
MS. KAT BRADY
LIFE OF THE LAND
76 North King Street, Suite 203
Honolulu, Hawaii 96817

1 Copy
U.S. Mail

MR. CARL FREEDMAN
HAIKU DESIGN & ANALYSIS
4234 Hana Highway
Haiku, Hawaii 96708

1 Copy
U.S. Mail

MR. WARREN S. BOLLMEIER II
PRESIDENT
HAWAII RENEWABLE ENERGY ALLIANCE
46-040 Konane Place, #3816
Kaneohe, Hawaii 96744

1 Copy
U.S. Mail

DOUGLAS A. CODIGA, ESQ.
SCHLACK ITO LOCKWOOD PIPER & ELKIND
TOPA FINANCIAL CENTER
745 Fort Street, Suite 1500
Honolulu, Hawaii 96813
Counsel for BLUE PLANET FOUNDATION

1 Copy
U.S. Mail

MR. MARK DUDA
PRESIDENT
HAWAII SOLAR ENERGY ASSOCIATION
P.O. Box 37070
Honolulu, Hawaii 96837

1 Copy
U.S. Mail

MR. RILEY SAITO
THE SOLAR ALLIANCE
73-1294 Awakea Street
Kailua-Kona, Hawaii 96740

1 Copy
U.S. Mail

KENT D. MORIHARA, ESQ.
KRIS N. NAKAGAWA, ESQ.
SANDRA L. WILHIDE, ESQ.
MORIHARA LAU & FONG LLP
841 Bishop Street, Suite 400
Honolulu, Hawaii 96813
Counsel for MAUI LAND & PINEAPPLE COMPANY, INC.

1 Copy
U.S. Mail

MR. THEODORE E. ROBERTS
SEMPRA GENERATION
101 Ash Street, HQ 12
San Diego, California 92101

1 Copy
U.S. Mail

MR. CLIFFORD SMITH
MAUI LAND & PINEAPPLE COMPANY, INC.
P.O. Box 187
Kahului, Hawaii 96733

1 Copy
U.S. Mail

MR. ERIK KVAM
CHIEF EXECUTIVE OFFICER
ZERO EMISSIONS LEASING LLC
2800 Woodlawn Drive, Suite 131
Honolulu, Hawaii 96822

1 Copy
U.S. Mail

JOHN N. REI
SOPOGY INC.
2660 Waiwai Loop
Honolulu, Hawaii 96819

1 Copy
U.S. Mail

GERALD A. SUMIDA, ESQ.
TIM LUI-KWAN, ESQ.
NATHAN C. NELSON, ESQ.
CARLSMITH BALL LLP
ASB Tower, Suite 2200
1001 Bishop Street
Honolulu, Hawaii 96813
Counsel for HAWAII HOLDINGS, LLC, dba FIRST WIND HAWAII

1 Copy
U.S. Mail

MR. CHRIS MENTZEL
CHIEF EXECUTIVE OFFICER
CLEAN ENERGY MAUI LLC
619 Kupulau Drive
Kihei, Hawaii 96753

1 Copy
U.S. Mail

MR. HARLAN Y. KIMURA, ESQ.
CENTRAL PACIFIC PLAZA
220 South King Street, Suite 1660
Honolulu, Hawaii 96813
Counsel for TAWHIRI POWER LLC

1 Copy
U.S. Mail

SANDRA-ANN Y.H. WONG, ESQ.
ATTORNEY AT LAW, A LAW CORPORATION
1050 Bishop Street, #514
Honolulu, Hawaii 96813
Counsel for ALEXANDER & BALDWIN, INC.,
Through its division, HAWAIIAN COMMERCIAL & SUGAR COMPANY

1 Copy
U.S. Mail

DATED: Honolulu, Hawaii, January 12, 2009.

KENT D. MORIHARA
KRIS N. NAKAGAWA
SANDRA L. WILHIDE

Morihara Lau & Fong LLP
Attorneys for Hawaii BioEnergy, LLC